

88-1688

Supreme Court, W. Va.  
FILED

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JOSEPH F. SPANIOLO, JR.  
CLERK

No.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

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COMMITTEE ON LEGAL ETHICS OF THE WEST  
VIRGINIA STATE BAR,

*Petitioner*

v.

GEORGE R. TRIPLETT, *et al.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**QUESTION PRESENTED**

Whether the attorney's fees provisions of the Black Lung Benefits Act, as applied, violate the Due Process Clause of the Fifth Amendment by denying claimants access to counsel.

# **PARTIES TO THE PROCEEDING**

Petitioner is the Committee on Legal Ethics of The West Virginia State Bar. The United States Department of Labor was invited to and did intervene below. Accordingly, they are designated as a respondent in this Court under Rule 19.6 of the Rules of this Court.

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## **TABLE OF AUTHORITIES**

Petitioner relies upon the authorities cited by the United States Department of Labor already filed in this matter.

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The West Virginia State Bar petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

**OPINIONS BELOW**

The opinion of the Supreme Court of Appeals (App., *infra*, 1a-32a), is reported at 376 S.E. 2d 818. A dissenting opinion (App., *infra*, 33a-36a) is unreported. An opinion on rehearing (App. *infra*, 37a-41a) is reported, but not correctly identified at 376 S.E.2d 832 (Advance Sheets). The Findings of Fact, Conclusions of Law, and Recommendation Concerning Discipline of the Committee on Legal Ethics of the West Virginia State Bar (App., *infra*, 42a-51a), are unreported.<sup>1</sup>

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<sup>1</sup> The Petitioner relies upon the Appendices to the Petition of the United States Department of Labor already filed in this matter.



## JURISDICTION

The judgment of the Supreme Court of Appeals was entered October 26, 1988 (App., *infra*, 1a-30a). A petition for rehearing was denied on December 21, 1988 (App., *infra*, 52a). On March 14, 1989, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including April 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. 932(a) (1982 & Supp. IV 1986), incorporating various provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), and Section 28 of the LHWCA (33 U.S.C. 928 (1982 & Supp. IV 1986)), which is one of the provisions so incorporated, are set forth in an appendix (App., *infra*, 53a-56a).

The Department of Labor's regulations governing the payment of claimants' attorney's fees in black lung cases, 20 C.F.R. 725.365-725.367, are set forth in an appendix (App. *infra*, 57a-60a).

## STATEMENT

In this case the Supreme Court of Appeals of West Virginia determined that the system for awarding attorney's fees in black lung cases violates the Due Process Clause of the Fifth Amendment by denying claimants access to counsel. The court concluded that the attorney's fee system produces undue delays in payment and provides inadequate compensation, thereby discouraging most attorneys in West Virginia from representing claimants for black lung benefits. The court thus held that, as applied, the attorney's fee provisions are unconstitutional, and, consequently, the violation of those provisions cannot serve as the basis for attorney discipline proceedings.

Petitioner originally charged Respondent Triplett with misrepresentation to the Department of Labor regarding his intentions to collect a fee. For this reason, charges were laid under West Virginia Disciplinary Rule 1-102 (a) (4) (5) and (6), alleging professional misconduct reflecting upon Respondent Triplett's fitness to practice law rather than under West Virginia Disciplinary Rule 2-106, collecting an illegal fee. Unfortunately, the West Virginia Supreme Court of Appeals found, using somewhat tortuous reasoning, that Respondent Triplett's misconduct was "his knowing violation of the DOL regulations, not his alleged misrepresentation to the DOL regarding his intention to collect a fee." The West Virginia Supreme Court pointedly added that had Petitioner found Respondent "... lied to the DOL, such a finding would not have been supported by the record." (App., *infra*, 6a).

Petitioner further adopts the Statement of the Case prepared and filed by the United States Department of Labor.

## REASONS FOR GRANTING THE PETITION

A. Clarification is necessary to guide attorneys in West Virginia. The present situation leaves both claimants' and employees' attorneys in doubt concerning the proper procedures regarding black lung fees. The Department of Labor, in its Petition, indicates West Virginia has slightly less than one-fifth of the seven to eight thousand cases filed each year (Department of Labor Petition, pages 17 and 21), or approximately 300 or more cases a year. The confusion in those cases should be dispelled and the matter decided to prevent the spread to other jurisdictions.

B. Additionally, Petitioner adopts the Reasons for Granting the Petition as prepared and filed by the United States Department of Labor.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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